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HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 536

In the Matter
of
FLORIDA EAST COAST RAILWAY COMPANY,
Debtor,

ST. JOE PAPER COMPANY, a corporation, and JESSIE BALL duPONT, ELBERT DENT, EDWARD BALL and THE FLORIDA NATIONAL BANK OF JACKSONVILLE, as Testamentary Trustees of the Trust Estate created by the Last Will and Testament of Alfred I. duPont, J. BRYSON AIRD and BANK OF THE MANHATTAN COMPANY as Successor Mortgage Trustees, RAILWAY LABOR EXECUTIVES' ASSOCIATION, SEABOARD AIR LINE RAILROAD COMPANY, and SOUTHERN RAILWAY SYSTEM AND AFFILIATED LINES (being the companies listed inside of cover),
Petitioners,

vs.

ATLANTIC COAST LINE RAILROAD COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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vs.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in this cause.

Opinions Below

The opinion of the District Court (R. Vol. VII, p. 127) has not been reported. A copy is appended as Appendix I.

The opinion of the Court of Appeals (R. Vol. VII, p. 380) has not been reported. A copy is appended as Appendix II.

Jurisdiction

The judgment of the Court of Appeals was entered November 5, 1954.

Jurisdiction to issue the writ rests on Title 28, United States Code §1254.

Questions Presented

I. The questions presented cannot be framed adequately without reference to this Court's prior opinion.* It was there decided that a plan of reorganization calling for the Debtor's merger with the Atlantic Coast Line had a congenital defect, beyond remedy, because not initiated as a voluntary proposal by the two carriers involved. The directions now given by the Court of Appeals to the court below to proceed in accordance with its own opinion *and* this Court's earlier opinion would result in effectually circumventing this Court's opinion and mandate. Essentially, the first question presented is whether the Court of

* 347 U. S. 298 (April 5, 1954) R. Vol. VII, p. 213.

Appeals rather than this Court may decide whether this Court's mandate has been obeyed.

II. It has repeatedly been determined that the Debtor's stock is worthless and the Court of Appeals admits that no one has challenged that determination. Nevertheless, the Court of Appeals has now adopted the remarkable contention of the Atlantic Coast Line that this Court by its opinion of April 5, 1954 created some value for that stock. It is clear from the record that the Atlantic Coast Line now is attempting to use the Debtor's sole shareholder as its cat's-paw. The contention that the stock has now been endowed with a newly-created value is based upon a footnote to this Court's opinion, which obviously has been misconstrued. Accordingly, the second question presented is whether such erroneous "interpretation" of that footnote is to be allowed to stand. The decision of this question is of the utmost importance in all future proceedings herein.

III. No party in interest having asked the District Court to return the Section 77 proceedings to the Interstate Commerce Commission, that Court dismissed the bankruptcy proceeding and returned the case to the equity foreclosure cause. The Court of Appeals reversed such action, notwithstanding the lack of any motion of the type contemplated by Section 77 (e), and held that the case must remain in bankruptcy. Here is presented the question of whether the Court of Appeals reversal was not in direct conflict with the requirements of Section 77 (e).

IV. After this Court had ruled that the plan considered by it was defective and for that reason had reversed an earlier Court of Appeals decision

which had directed that the plan be "approved", the question is presented whether the Court of Appeals may now say that its previous decision has not been overthrown, made void, undone or annulled; and whether one of its Judges may maintain in his concurring opinion that the earlier holding "that the plan was a good one" remains as "the law of the case" and that "The Supreme Court did not find anything wrong with the plan itself".

V. This Court ruled that the very heart of Section 5 of the Interstate Commerce Act is that a merger may be approved "only if it originates" as a voluntary proposal by the merging carriers and that, because this plan was imposed by Commission fiat, it had a congenital defect and "it matters not that the security holders might ultimately accept the plan". An additional question raised by the opinion of Circuit Judge Holmes is whether, in the face of this Court's decision, it may now be ruled that "consent" *after* the "approval" of the plan is *all* that is required, and that *any* proceedings under Section 5 of the Interstate Commerce Act *shall* take place *after* "confirmation" of the plan.

Statutes Involved

The chief statute involved is Section 77 of the Bankruptcy Act, the pertinent portions of which are:

> "(e) * * * If the judge shall not approve the plan, he shall file an opinion, stating his conclusions and the reason therefor, and he shall enter an order in which he may either dismiss the proceedings, or in his discretion

and on motion of any party in interest refer the proceedings back to the Commission for further action, in which event he shall transmit to the Commission a copy of any evidence received. * * *" (Sec. 77, Bankruptcy Act, Title 11, U. S. C., Sec. 205 (e)). (Italics supplied.)

"(g) * * * If in the light of all the existing circumstances there is undue delay in a reasonably expeditious reorganization of the debtor, the judge, in his discretion, shall, on motion of any party in interest *or on his own motion,* after hearing and after consideration of the recommendation of the Commission, dismiss the proceedings. Upon the filing of such an order of dismissal, all right, title or interest of the trustee or trustees shall vest by operation of law in the debtor unless otherwise provided by such order" (Sec. 77, Bankruptcy Act, Title 11, U. S. C., Sec. 205 (g)). (Italics supplied.)

"(i) * * * Whether or not a receiver or trustee has been appointed by a Federal or State court prior or subsequent to the institution of a proceeding under this section and upon the dismissal of such proceeding under this section, the judge may include in the order of dismissal appropriate provisions directing the trustee or trustees, or the debtor if no trustee has been appointed, at the time of such order of dismissal, to transfer possession of the debtor's property within the territorial jurisdiction of such Federal or State court to the prior receiver or trustee, if a prior receiver or trustee has been so appointed by such Federal or State court, or to a receiver or trustee appointed by such Federal or State court, upon such

terms as the court in the proceeding under this section may deem equitable for the protection of the obligations incurred by any trustee or trustees appointed under this section and for the payment of administrative expenses and allowances in the proceedings hereunder. Upon the filing of such order of dismissal all title to the property in the trust estate shall vest as therein provided" (Sec. 77, Bankruptcy Act, Title 11, U. S. C., Sec. 205 (i)).

Statement of the Case

The Debtor, Florida East Coast Railway Company, is being reorganized. At the outset, there was an equity receivership. Little progress was made, largely because of insufficient earnings. In January 1941 the case was transferred to the bankruptcy court because certain holders of First and Refunding Mortgage Bonds (usually referred to herein as the 5% bonds) believed it necessary to modify the underlying issue of First Mortgage Bonds, then outstanding in the amount of $12,000,000. For almost 14 years since then, efforts to reorganize have continued, without success, under Section 77.

After 1941 greatly improved railroad conditions were enjoyed generally, and the Florida East Coast shared the upturn. With resulting accumulations of cash the bankruptcy trustees have purchased (for the account of the 5% bondholders) part of the underlying bonds, so that today only about $8,000,000 principal amount are outstanding, and there is accumulated cash more than sufficient to cover all this prior debt. All recent reorganization plans have provided that the underlying bonds still outstanding will be

paid off in full, either upon consummation of the plan or at their maturity on June 1, 1959. The Debtor's stock is worthless. Thus, except for unsecured creditors entitled to participate in the proceeds of unmortgaged assets, the only security holders to be affected by the reorganization are the 5% bondholders.

The Commission has formally declared that these 5% bondholders are "prior to the reorganization of the debtor, the *equitable owners*" of the Debtor's property (282 I. C. C. 81 at p. 186). (Italics supplied.)

This Court's opinion of April 5, 1954, held the most recent reorganization plan invalid, declaring that it had a congenital defect because it called for the merger of the Debtor with the Atlantic Coast Line under a merger plan that had not been initiated by the two carriers themselves as required by Section 5 of the Interstate Commerce Act. This Court held that the defect could not be cured subsequently, even by ratification or a vote of the Florida East Coast security holders, saying "it matters not that the security holders might ultimately accept it if it were put to them for a formal vote", that such a "Hobson's choice" was not the equivalent of the initiation required by Section 5.

The respondent, Atlantic Coast Line, petitioned this Court for a rehearing, indicating that, if permitted to do so, it would introduce evidence it thought relevant to the subject of the "initiation" of the merger plan. That rehearing petition was denied by this Court. No permission to introduce additional evidence was granted.

Following this Court's decision, the Atlantic Coast Line asked the District Court to reopen the record to take evidence. It also made a motion for approval

of the same reorganization plan by the District Court. In that way it asked the District Court to disregard, overrule or circumvent this Court's decision. It urged that the plan, which this Court had found to be defective and invalid, was nevertheless "a good plan". It persisted in offering the same evidence which this Court had declined to entertain.

The new evidence which the respondent offered to the District Court was of two general classes, namely, (1) that for some years the Atlantic Coast Line had what the respondent called a "verbal option" to purchase all of the Debtor's outstanding stock (although the purported option was unwritten and no price for the stock was ever agreed upon), and (2) that following this Court's decision of April 5, 1954, the trustee of a trust which owned all the Debtor's stock had attempted *nunc pro tunc* to "initiate" the merger plan on behalf of the Debtor.

In answer to a question from the Court, the president of the Atlantic Coast Line also testified that the stock of the Debtor was "made of value by the Supreme Court of the United States on April 5, 1954". He further testified that such value was not merely "a nominal figure" (R. Vol. VII, pp. 84-7).

The 5% bondholders asked the District Court to dismiss the Section 77 proceedings and to permit the bondholders, after this delay of almost fourteen years, to resume the foreclosure of their lien upon the mortgaged property. In 1952, the representatives of 75% of the outstanding 5% bonds filed written motions to that effect and a similar motion was filed by the mortgage trustees acting for the holders of 24% of the outstanding bonds, not otherwise represented in these proceedings (R. Vol. I, pp. 1, 21-23, 125-6, 166-7, 169),

and the same parties renewed that motion at the 1954 District Court hearing (R. Vol. VII, pp. 55-6).

No one made any motion to have the matter referred back to the Interstate Commerce Commission.

The District Court tentatively received some of the evidence offered, over the objection of the 5% bondholders, but later ruled that all of the evidence was "wholly irrelevant". The District Court held as to the alleged option that "No such option does or ever has existed", basing its action on the fact that the so-called option had never been reduced to writing and had never fixed a price or a formula by which the price could be determined (Appendix I, p. 28).

As to the stockholders' attempt to cure the original defect by an *ex post facto* ratification, the District Court said:

> "* * * as this Court interprets the decision of the Supreme Court, the origin of the plan was such as to preclude its being made effective. The situation is and has been that the plan is a nullity. This Court holds that, to be valid, a merger plan submitted by the Interstate Commerce Commission must not only have the consent of the carriers affected, but must be *initiated* by them" (R. Vol. VII, pp. 129-30; Appendix I, p. 28). (Italics supplied.)

The District Court refused to grant the Atlantic Coast Line's motion for "approval" of the plan. It ruled that the bankruptcy proceedings should be dismissed and that the previously-existing equity foreclosure cause should be reactivated (Appendix I, p. 31).

Instead of applying to this Court to determine whether the action of the District Court had complied with this Court's mandate, the Atlantic Coast Line thereafter appealed to the Court of Appeals, Fifth Circuit. The 5% bondholders, who are, according to the Commission, the "equitable owners" of the Debtor's property, moved to dismiss the appeal on the ground that this Court alone, the court which had issued the mandate, had jurisdiction to determine whether that mandate was complied with (R. Vol. VII, pp. 372-8).

The Court of Appeals, with two separate concurring opinions (which it is respectfully submitted are confusing and conflicting), has now denied our motion to dismiss the appeal, and it has reversed the District Court (Appendix II, pp. 41-2; R. Vol. VII, p. 395). It does not discuss the motions to dismiss. It merely asserts that its "appellate jurisdiction in this matter is full and complete" citing Section 2106 of Title 28, U. S. Code (Appendix II, p. 40).

In doing this the *per curiam* opinion concedes that the District Court had no alternative but to disapprove the plan which this Court has declared illegal. The Court of Appeals, however, adopts the contention made from the witness stand by the president of the Atlantic Coast Line that this Court's opinion of April 5, 1954, in some fashion created a previously non-existent value for the Debtor's stock. In reaching this extraordinary conclusion the Court of Appeals itself recites that the claims ahead of the stock "total well in excess of $80,000,000" and that all findings of value of the Debtor's assets fix a total "well under $50,000,000".

In the face of these figures indicating that a deficit of about $30,000,000 would have to be made up before the stock could have any value, the Court of Appeals asserts that as a result of this Court's April 5, 1954 opinion (and apparently in particular as a result of footnote 12 to that opinion) the stock has now become valuable. The Court of Appeals says that this newly-created value is "of an unreal quality", that it was "derived instantly" from this Court's decision "just as Pallas Athene fully armed stepped out of the head of Zeus", that it is "artificial value" but that nevertheless the District Court should not have disregarded it (Appendix II, p. 34).

The Court of Appeals holds that the Section 77 proceeding should not have been dismissed. It indicates that the proceeding should have gone back to the Commission. Its opinion does not deal with the statutory language which provides that "on motion of any party in interest" the judge may in his discretion refer the proceeding back to the Commission, nor with the fact that there was no such motion.

The Court of Appeals, moreover, approves the introduction of additional evidence, ignoring our objection that the record may not be so supplemented, upon remand, without the express leave or order of this Court, after this Court had disposed of the case on the merits.

The separate concurring opinion of the senior circuit judge sitting on the case, one of the three opinions on which the Court of Appeals action is based, holds that a consent to the proposed merger *after* the "approval" of the plan is all that is required by Section 5 of the Interstate Commerce Act and, in fact, that *any* proceedings under Section 5

"shall" take place *after* "confirmation" of the plan (Appendix II, pp. 42, 43). In both respects such "interpretation" of this Court's decision is in direct conflict with the opinion of this Court.

The same judge has also ruled that this Court's decision of April 5, 1954 "was not on the merits of the plan itself except insofar as it related to a forced merger" and that "except as to the merger provisions" the previous holding of the Court of Appeals *en banc* (which this Court had reversed) "that the plan was a good one" is still the "law of this case" (Appendix II, p. 44). The same view is indicated in the *per curiam* opinion (see Appendix II, p. 33), where the Court of Appeals suggests that substantially all of its earlier decision stands untouched notwithstanding the reversal by this Court.

The Court of Appeals seems to fear that if the case does not remain under Section 77 there will be lost the expert guidance of the Interstate Commerce Commission. This disregards the fact that the Commission possesses under Section 20 (a) of the Interstate Commerce Act a continuing control and supervision over all railroad financing. A necessary step in the accomplishment of any reorganization pursuant to an equity foreclosure must be the filing of a petition with the Commission for approval of the securities to be issued, proposed fixed charges, and similar details. The Commission is directed to hold public hearings with a view to protecting the interest of the public. Under the statutes the Commission is in a position to exert "leadership" in these matters whether its expert services are utilized in connection with Section 77 proceedings or otherwise.

With only one class of security holders now to be dealt with under the plan, a reorganization in equity

promises to be much more expeditious than could any Section 77 reorganization of this Debtor.

Basis of Federal Jurisdiction

Federal jurisdiction in the court of first instance is based upon the fact that the case comes properly within the provisions of Section 77 of the Bankruptcy Act.

ARGUMENT

The Court of Appeals Erred in Undertaking to Determine Whether This Court's Mandate Had Been Obeyed

It is a well established principle that the court issuing a mandate is the one to decide whether its mandate has been carried out properly.

In re Sanford Fork & Tool Co. (1895), 160 U. S. 247, 255-6;
Ex parte The First National Bank of Chicago (1907), 207 U. S. 61;
Mackall v. *Richards* (1885), 116 U. S. 45, 47-8;
Sibbald v. *U. S.* (1836), 12 Pet. 488, 492;
Texas & Pacific Railway v. *Anderson* (1893), 149 U. S. 237;

Although we urged, by motion to dismiss the appeal, that the question of whether or not the District Court had obeyed this Court's mandate was one solely for determination by this Court, the Court of Appeals usurped the functions of this Court by undertaking itself to decide that question. It compounded the error by incorrectly ruling (a) that this Court's opinion had given value to the worthless stock and (b) that the District Court should not have dismissed the bankruptcy cause.

The Court of Appeals Erred in Holding That the Worthless Stock Has Acquired Value

It has repeatedly been affirmed in this proceeding that the Debtor's stock is completely worthless. The *per curiam* opinion of the Court of Appeals correctly states:

> "The stock of this debtor on seven occasions has been held by the Interstate Commerce Commission to be without value, and no objection has ever been made to any of these findings. The claims ahead of the stock, including the principal and interest of its First Refunding Mortgage bonds, total well in excess of $80,000,000 while all the findings of the value of the assets that would be available toward the satisfaction of those claims fix the value at well under $50,000,000." (Appendix II, p. 34)

Similarly, the late Circuit Judge Strum, sitting as the District Court, in his opinion of June 28, 1954 stated:

> "Also the Court is not satisfied that initiation and approval of the merger or absorption plan by the Florida East Coast Stockholders, even had it been timely, would have been sufficient in this case. It is clearly established by the record that the stock of the debtor has no value, and that this stock has never had any value during the pendency of these proceedings. The assets of the debtor are substantially less than the claims of creditors to be satisfied from those assets. There is no possible equity for stockholders after payment of the proved debts. I am loath to be-

> lieve that any action taken by the holders of this worthless stock would be of any significance. Both the Interstate Commerce Commission and this Court have held that the 5% bondholders are the equitable owners of the Railway, and it would be intolerable to give the worthless stock power to control its disposition" (R. Vol. VII, p. 131; Appendix I, p. 30).

The Court of Appeals nevertheless reversed Judge Strum and held that the worthless shares had regained some sort of artificial value, that holding being based on a misconstruction of footnote 12 of this Court's April 5, 1954 opinion.

Clearly, if by that footnote this Court had intended to permit the worthless stock to initiate a merger, it would have granted the petition for rehearing dated April 19, 1954 filed herein by the Atlantic Coast Line. That petition attempted to interpret footnote 12 as follows:

> "What this Court has said is that Florida East Coast Railway Company or the Bingham Trust must take some affirmative action if there is to be a valid plan" (R. Vol. VII, p. 322).

Coupled with that "interpretation" was an offer by the Atlantic Coast Line to submit evidence that the Bingham Trust held all the stock of the Debtor, Florida East Coast, and that its trustee was president of the Debtor, plus evidence showing that Atlantic Coast Line held an option to acquire all the Debtor's stock. In short, that rehearing petition proclaimed that Atlantic Coast Line was in control, so that it readily could cause the debtor corporation or the Bingham Trust to take affirmative action to bring about a merger (R. Vol. VII, pp. 318-9).

This Court denied that petition for rehearing, but now the Court of Appeals has accepted the arguments there advanced and has used them as the basis for its opinions reversing the District Court. The interpretation of footnote 12 which was advanced in the petition for rehearing and rejected by this Court is the cornerstone of the Court of Appeals decision.

Footnote 12 should be construed within the framework of the paragraph (in the main body of this Court's opinion) to which it was appended. The central idea of that paragraph is that this Court's holding (*i. e.,* that the Commission may not initiate a merger of carriers) does not mean that there can be no merger of a debtor railroad involved in a Section 77 reorganization. In relation to that central thought, footnote 12 merely explains that pendency of a Section 77 proceedings does not, in and of itself, end either the debtor's existence or the possibility of carrier-initiation of a merger plan.

The footnote states that "those who *in the absence of* § 77 would wield the corporate merger powers" are the persons who must initiate any merger now. (Italics supplied.) Who are those persons? This Court stated earlier in its opinion that the 5% bondholders are "in substance the owners of the debtor corporation" (347 U. S. at page 301), just as the Commission had previously declared them the "equitable owners". This Court also held that the plan was invalid because it was "initiated by the Commission rather than by their own corporation" (347 U. S. at pp. 313-4). Under any fair and equitable reorganization plan, these bondholders are entitled to control the debtor railroad or the reorganized corporation; and, *a fortiori,* "in the absence of § 77" such 5% bondholder control would have been perfected years ago, from

foreclosure or other enforcement of creditors' rights. Accordingly it follows that in this case the 5% bondholders are those who are entitled to wield the corporate merger powers.

The rule, of course, would be different if there were any equity remaining for the stockholders, as might well be the situation in another case.

When so read in context, footnote 12 cannot properly be construed as holding that in the case of a carrier in bankruptcy proceedings the decision as to initiating a merger must be made by the holders of its concededly worthless stock. The Court of Appeals has taken the footnote from its context, then has treated it as the heart of the decision and finally, in doing this, has distorted its meaning. This is just what the Atlantic Coast Line itself tried to do, without success, in its April 19, 1954 petition to this Court for a rehearing, which this Court denied (R. Vol. VII, pp. 318-9, 322-4).

While we are discussing footnote 12, it may be in order to mention its last sentence which pointed out that Section 77(d) not only permits but requires the debtor railroad itself to file a plan of reorganization. At the time that footnote was written, this Court's attention had not been called to the fact that the reorganization court, at the Debtor's request, had early in this case, by its order of January 31, 1941, ex-expressly relieved the Debtor from any duty under Section 77 to file any plan of reorganization. The Debtor, in its very first pleading in the case—the one in which it asked to be so relieved of any such duty—had admitted that the total value of its assets was far less than the amount due on its mortgage bonds (R. Vol. VII, pp. 6-7).

The Court of Appeals believes that the previous opinion of this Court has endowed the stockholders with a valuable position. Such endowment, if it is to have value in any ordinary sense, must be the privilege to force the lien creditors to make concessions to them or, in the alternative, the privilege to collect from Atlantic Coast Line a premium for aiding it. In *Case* v. *Los Angeles Lumber Co.,* this Court said that

> "To hold that * * * creditors of an obviously insolvent debtor may be forced to share the already insufficient assets with stockholders * * * would disregard the standards of 'fair and equitable' " (308 U. S. 106, at 124).

Here, we feel sure that this Court will deem it likewise unfair and inequitable for the stockholders to be given the privilege of using their worthless shares to secure some consideration (and not merely a "nominal value"—R. Vol. VII, p. 87) from Atlantic Coast Line for assisting in initiating the merger plan which the latter so greatly desires. Such must have been the aim of the purported option to purchase the shares, otherwise worthless, which Atlantic Coast Line unsuccessfully attempted to establish that it held—and presumably was prepared to exercise. The entire concept is contrary to the rule of the *Boyd* case (*Northern Pacific Railway* v. *Boyd,* 228 U. S. 482) and the long line of decisions following that principle.

Section 77 (e) Requires a Motion by a Party in Interest If the Case Is to Be Referred Back to the Commission

The situation with which the District Court had been presented was as follows: This Court's opinion had made it necessary for the District Court to dis-

approve the plan. The Court of Appeals concedes that (Appendix II, p. 41).

Subdivision (e) of Section 77 of the Interstate Commerce Act provides that if the District Judge shall not "approve" the plan "he shall enter an order in which he may either dismiss the proceedings, or in his discretion *and on motion of any party in interest* refer the proceedings back to the Commission for further action." (Italics supplied.) Had "any party in interest" made a "motion" to refer the proceedings back to the ICC, the District Court would have been able to exercise its discretion as to whether or not that motion should be granted—or whether, in the alternative, he should "dismiss the proceedings". Without such a motion by a party in interest, however, there was no authority in law for the exercise of discretion. The District Court had no alternative but to dismiss.

Had Congress meant to give the District Court discretion to refer the case back to the Commission whether or not any party had so moved, Congress would have used language similar to that of Section 77 (g), which provides that where there has been undue delay "the judge, in his discretion, shall, on motion of any party in interest *or on his own motion*" dismiss the proceedings. In neighboring subdivision (e), which governs the District Court in this case, the words "or on his own motion" do not appear.

This Court's Reversal of the Previous Decision of the Court of Appeals Reversed That Decision *in Toto*

As already pointed out in the statement of the case, one, and perhaps two, of the three opinions upon

which the action of the Court of Appeals was based disregarded the fact that this Court had found the plan defective (Appendix II, pp. 33, 44). The Court of Appeals cites Webster's dictionary to show that to reverse a judgment means to make it void, to undo or annul it, but then proceeds as if this Court had merely modified and otherwise affirmed the earlier decision of the Court of Appeals. This is based upon the fact that this Court had limited the scope of its writ of certiorari and had held that the "sole question" before it for decision is whether the Commission has power under Section 77 to submit a plan whereby a debtor railroad would be compelled to merge with another having no prior connection with it (See 347 U. S. 298, at page 299). As a result, the Court of Appeals holds that most of its own earlier decision remains in full force and effect. This Court did not so limit its reversal. It ruled that the "judgment [of the Court of Appeals] is reversed and the case is remanded to the District Court for further proceedings in accordance with this opinion" (347 U. S. 298, at page 315). That obviously was not intended as an affirmance, even in part.

Circuit Judge Holmes went on to assert directly in his opinion that the earlier holding of the Court of Appeals to the effect that the plan was a "good" plan stands as the "law of this case". He also declared, in the face of this Court's ruling to the contrary, that only *after* "approval" and even "confirmation" of the plan is it necessary to get the consent of the security holders to the proposed merger. This Court had clearly ruled that such a "Hobson's choice" should *not* be put to the security holders. In both respects, the Circuit Judge is undertaking to overrule this Court's April 5, 1954 opinion.

Conclusion

When the case was before this Court previously, counsel for these petitioners, in answer to a question of Mr. Justice Douglas, declared in substance:

> "We stand fast on the proposition that nobody who has no interest in this road has any right to speak for it * * *. The stockholders haven't a penny of interest in the road, and they haven't shown up in the litigation. It has been found that the stock is worthless. The road just belongs to these bondholders."

That was our position then. It is our position now.

Until this Court handed down its opinion, the Debtor's sole stockholder had taken no part in the proceedings, except in 1941, when he admitted that the stock was worthless, asked to be relieved of any duty to file a plan, and obtained such relief from the District Court.

At the present time, it is being asserted that not only has the same stockholder regained his position but that he has acquired a power to propose turning over the property of the 5% bondholders lock, stock and barrel to the Atlantic Coast Line, which long has coveted this prize. Rejection by this Court of any such proposition is the only way to settle the course of this reorganization.

We see no basis for the assertion that by a footnote in its opinion this Court intended to vest in the worthless stock a dominating power, or any power, in connection with the reorganization. An observation in the footnote that the debtor corpora-

tion is still in existence is quite different from a decision that the worthless stock, and not the 5% bondholders, may speak for that corporation.

This Court should take back the case, to clarify the situation. The three opinions filed in the Court below are no adequate chart for the future. It is futile to proceed with the reorganization without knowing who is entitled to speak for the Debtor. Without an authoritative decision by this Court, the result will be confusion, conflicting plans and a further fruitless expenditure of time and effort. Justice and good sense require that the parties now be given the essential guidance.

Also, this Court should uphold and support the rule that it has exclusive jurisdiction to interpret its own mandate and to determine whether there has been compliance. The Court of Appeals has plainly usurped authority to perform this Court's function. It was led to that error through the election of the Atlantic Coast Line to ask review of the decision of the District Court by the Court of Appeals rather than by this Court. The case now is presented to this Court, where it should have gone immediately if the District Court's action was to be reviewed. This Court should accept the opportunity to set the record straight and to permit the equitable owners to go forward with a prompt reorganization.

Respectfully submitted,

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APPENDIX I

Opinion of the District Court, Filed—June 28, 1954

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF FLORIDA

In Proceedings for the Reorganization of a Railroad

No. 4827-J

In the Matter of

FLORIDA EAST COAST RAILWAY COMPANY,

Debtor.

PER CURIAM:

This matter came on to be heard before this Court on the 21st day of June, 1954, all parties having been notified to appear and present their views as to what action this Court should now take in the light of the judgment and mandate of the Supreme Court of the United States.

Counsel representing the holders of the 5% Refunding Bonds of the Railway Company asked the Court to now adhere to and confirm its order herein of March 11, 1952, modified only in two particulars, namely, (a) fixing a new effective date for said order; and (b) because of the death of Scott M. Loftin named in the order of March 11, 1952, as a Reorganization Trustee in this cause and an Equity Receiver in cause No. 757-Equity, directing that the turnover should be made by John W. Martin as sole surviving Reorganization Trustee to John W. Martin as sole

Equity Receiver. Such action was objected to only by the Atlantic Coast Line, which through its counsel asked the Court to grant its motion filed herein, dated May 26, 1954, to now approve the plan approved by the Interstate Commerce Commission October 25, 1951, and certified to this Court November 7, 1951.

The Supreme Court considered only one question, namely, whether the Commission had statutory power to certify the plan which involved absorption of the Florida East Coast Railway and acquisition of all its property, where the Florida East Coast Railway had neither initiated the plan or agreed to it. It held that because one of the carriers involved had never agreed to the plan and had no part in initiating it, the plan was unauthorized. The majority opinion says:

> "The sole question for decision in this case is whether the Interstate Commerce Commission has the power under Sec. 77 of the Bankruptcy Act to submit a plan of reorganization to a district court whereby a debtor railroad would be compelled to merge with another railroad having no prior connection with the debtor. Answer to this problem depends on understanding of a long legislative history.
>
> The crucial question, therefore, is whether this merger plan meets the statutory requirements. Since it does not, as we have found, because it is sought to be imposed by Commission fiat rather than proposed by the merging carriers, it matters not that the security holders might ultimately accept it if it were put to them for a formal vote. The kind of Hobson's choice, more or less,

to which security holders are put when voting on a merger plan is not to be put to them on a plan initiated by the Commission rather than by their own corporation. And so, if a plan does not satisfy the basic conditions which circumscribe the Commission's power, it has a congenital defect, and any interested party can object to its attempted effectuation."

At the conclusion of its opinion the Supreme Court ruled, without reservation, that the judgment of the Court of Appeals is reversed and "the case is remanded to the District Court for further proceedings in accordance with this opinion". The effect of that decision and order was to wholly, not partially, nullify the judgment of the Court of Appeals; to completely abrogate the proposed plan of reorganization; and to grant leave to this Court to further proceed in any manner authorized by law and consistent with the Supreme Court's opinion. The decision renders the plan presently proposed congenitally and irrevocably defective because not initiated by both carriers involved.

More than two years ago this Court dismissed this bankruptcy proceedings in the exercise of its discretion under 77(e) and 77(g) of the Bankruptcy Act (11 USCA 205); the latter subsection dealing with unreasonable delay in reorganization. The situation today is even more aggravated. More than two additional years have passed, without progress, and in the light of present conditions the Court again finds, with added reason, and after having examined the recommendations of the Interstate Commerce Commission, that unreasonable delay has occurred. The

plan for an internal reorganization agreed to by the holders of the 5% Refunding Bonds, and filed in the cause, opens the way for a speedy internal reorganization in the equity foreclosure case.

The motion of the Atlantic Coast Line to put into effect the plan just held by the Supreme Court to be unauthorized by law and congenitally defective would disregard the mandate, not obey it.

The proof offered by the Atlantic Coast Line respecting its alleged option to buy the stock of the Florida East Coast Railway is wholly irrelevant. No such option does or ever has existed. The Atlantic Coast Line concedes that no price at which the option could be exercised has ever been agreed on. The option is and always has been a nullity. No attempt has ever been made to exercise it.

The attempt to prove that the trustee under the Mary Flagler Bingham Will has adopted the present illegal plan discloses no corporate action by the Florida East Coast Railway.

Furthermore, as this Court interprets the decision of the Supreme Court, the origin of the plan was such as to preclude its being made effective. The situation is and has been that the plan is a nullity. This Court holds that, to be valid, a merger plan submitted by the Interstate Commerce Commission must not only have the consent of the carriers affected, but must be *initiated* by them.

In *Schwabacher* v. *United States,* 334 U. S. 182, 92 L. Ed. 1305, the question in the case of a voluntary merger was whether the Commission could properly refuse to take jurisdiction of the claims of preferred stockholders demanding par value and accrued dividends for cumulative preferred stock. In the course

of the opinion the Court had occasion to comment on the meaning and effect of the provisions of the Interstate Commerce Act so adopted in 1920. The majority opinion by Mr. Justice Jackson quotes Section 5 at length and describes it as providing for voluntary mergers. He said (p. 193):

> "It authorized approval by the Commission of carrier-initiated, voluntary plans of merger or consolidation."

In his dissenting opinion Mr. Justice Frankfurter, referring to the fact that Congress had been asked in 1920 to eliminate waste and inefficiency by providing for compulsory combinations, and to do away with the system of operation of railroads by State corporations, said:

> "Congress rejected both demands. It left mergers of separate railroad properties to the will of their private owners, merely lodging a veto power in the Commission."

While the question in the *Schwabacher* case is not involved here, the fact that the Court gave to Sections 1 and 5 of the Interstate Commerce Act, added in 1920, the same meaning that we now do, and held that initiation and formulation of a merger plan by the carriers was as vital to its invalidity as consent, is quite material.

The power of initiation gives the carriers the power to choose all the terms of the merger. A merger plan initiated by the Commission would give the carriers only the power to agree to the Commission's idea of what the merger should be, which is a very different

thing. As the Supreme Court has said, that kind of Hobson's choice is not to be put to these security holders.

This Court is also of the opinion that the attempted "adoption" of the plan comes too late, and that the invalidity of the Commission's plan is now *res judicata.* Being congenitally defective, there are no means of activating it.

Also the Court is not satisfied that initiation and approval of the merger or absorption plan by the Florida East Coast Stockholders, even had it been timely, would have been sufficient in this case. It is clearly established by the record that the stock of the debtor has no value, and that this stock has never had any value during the pendency of these proceedings. The assets of the debtor are substantially less than the claims of creditors to be satisfied from those assets. There is no possible equity for stockholders after payment of the proved debts. I am loath to believe that any action taken by the holders of this worthless stock would be of any significance. Both the Interstate Commerce Commission and this Court have held that the 5% bondholders are the equitable owners of the Railway, and it would be intolerable to give the worthless stock power to control its disposition. In any event, whatever action the stockholders may have taken following the submission to the Supreme Court was too late to alter the status of the plan that was considered by that Court and found to be congenitally defective.

Furthermore, on January 25, 1941, the Florida East Coast Railway Company filed an answer to the petition filed on behalf of the First and Refunding

5% Bonds for the institution of proceedings under Sec. 77, in which petition it was alleged that the debts of the Florida East Coast Railway exceeded its assets. That answer admitted the asset deficiency. It also asked the Court to relieve the Florida East Coast Railway "of any duty under Sec. 77 to file a plan of reorganization".

The Court's order of January 31, 1941, states in paragraph 21, "the debtor is hereby relieved from any duty under Sec. 77 of the Bankruptcy Act to file any plan of reorganization".

The Florida East Coast Railway Company, therefore, conceded long ago that its stock was worthless and asked this Court to make an order relieving it from participation in the formulation of a reorganized plan under Sec. 77, which the Court did.

The effect of those proceedings was to eliminate the Florida East Coast Railway Company and its stockholders, at their request, as factors in the preparation or adoption of any reorganization plan.

For these and other reasons the debtor railway should go back into equity receivership, so that the speedy plan of reorganization there available may be consummated by the 5% Bondholders, who are the equitable owners of the property, and so that any person or persons desiring to buy the road shall be offered a fair opportunity to bid for it.

/S/ LOUIE W. STRUM.
Louie W. Strum,
United States Circuit Judge,
Sitting as District Judge,
Pro hac vice.

APPENDIX II

[380]

Opinion of the Court, Concurring Opinion of Holmes, Circuit Judge, and Specially Concurring Opinion of Russell, Circuit Judge, Filed—November 5, 1954

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 15244

ATLANTIC COAST LINE RAILROAD COMPANY,
Appellant,

VERSUS

ST. JOE PAPER COMPANY, et al.,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

(November 5, 1954.)

Before HOLMES, BORAH, and RUSSELL, Circuit Judges.

PER CURIAM: The motion to dismiss should be overruled because this appeal involves entirely new issues, which were not decided or considered by the Supreme Court, and not disposed of by its reasoning or judgment, when this case was before it. 345 U. S. 948. The Supreme Court reversed the judgment of the

Court of Appeals, and remanded the case to the District Court for further* proceedings in accordance with its opinion; but it did not give any particular directions to the district court and did not reinstate the latter's judgment which had been reversed by the judgment of the Court of Appeals. 201 F. 2d 330. To reverse a judment, according to Webster's dictionary, means to overthrow it by a contrary decision, to make it void, to undo or annul it for error. The mandate of the Supreme Court directed that the judgment of this court be reversed, with costs, and that this cause be remanded to the district court for further proceedings in accordance with the opinion of the Supreme Court; but it further appears that the Supreme Court, by its writ of certiorari, had limited its own inquiry, and consequently its own jurisdiction, to the single question as to whether, under Section 77 of the Bankruptcy Act, the Interstate Commerce Commission had "a power to force mergers." 345 U. S. 948. By so limiting its writ of certiorari, the Supreme Court expressly declined to review (1) this court's reversal of the District Court's finding that said plan was neither fair nor equitable and did not afford due recognition of the rights of the 5% bondholders, particularly the minority group; (2) this court's reversal of the District Court's finding that there had been an unnecessary delay in a reasonably expeditious reorganization of the debtor; and (3) this court's reversal of the District Court's decision to dismiss the bankruptcy proceeding and turn the debtor's property over to an equity receiver.

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* Page 380 ends here in certified transcript.

Appendix II

This is the third appearance before us of this proceeding under Section 77 of the Bankruptcy Act. The debtor is the Florida East Coast Railway Company, a Florida corporation, which owns a line of railroad be-* tween Jacksonville and Miami, Florida, together with terminals, rolling stock, and other assets. The stock of this debtor on seven occasions has been held by the Interstate Commerce Commission to be without value, and no objection has ever been made to any of these findings. The claims ahead of the stock, including the principal and interest of its First Refunding Mortgage bonds, total well in excess of $80,000,000 while all the findings of the value of the assets that would be available toward the satisfaction of those claims fix the value at well under $50,000,000. The only value that this stock has is of an unreal quality, which it derived instantly from the Supreme Court's opinion of April 5, 1954, just as Pallas Athene fully armed stepped out of the head of Zeus.

In his opinion of June 28, 1954, the District Judge failed to recognize this artificial value or disregarded its effect in the Supreme Court, and stated it to be clearly established by the record that this stock had no value, that it had never had any value during the pendency of this proceeding, and that there was no possible equity for stockholders after the payment of proven debts. Later he referred twice to this "worthless stock." The creditors committee, which instituted this proceeding in bankruptcy, alleged that the fair value of the debtor's property was less than the principal and accrued interest on its outstanding

* Page 381 ends here in certified transcript.

bonds. The debtor, in its answer, admitted all of the allegations in the petition, and prayed that it be relieved from any duty under Section 77 to file a plan of reorganization, in view of the fact that the petitioners were filing one. Impliedly conceding that it was the debtor's duty to file a plan, it prayed to be relieved* of any such duty, and the court granted this prayer. The order relieved the debtor of the duty to initiate a plan; it was not objected to or appealed from; and no question of its propriety or the jurisdiction of the court to make it was raised by any one.

At the hearing that preceded the order of June 28, 1954, from which this appeal was taken, the appellant offered evidence to show that the debtor had consented to the merger feature of the plan, as well as to its other provisions, and that no forced merger was contemplated by the plan so far as the debtor was concerned, because the latter had concurred in it initially, and had formally adopted it after the Supreme Court's decision. The majority of the Supreme Court thought that the plan would involve the application of force against the Florida East Coast Railway Company, as it spoke of the plan being forced or foisted upon the carrier or corporate entity; and the District Judge was of the opinion that the attempted adoption of the plan came too late, since it was "congenitally defective" and there were "no means of activating it."

The Atlantic Coast Line, on remand, also proffered evidence to show that there had been no change in conditions as a result of which the plan, found to be

* Page 382 ends here in certified transcript.

fair by this court on January 19, 1953, had become unfair by June 21, 1954; it further offered to prove that not merely had there been no change in conditions which had made the plan unfair, but that the trend had been the other way and, if any change had taken place, the plan was fairer than it was when previously approved. The court below refused this proffer of evidence, and dismissed* the bankruptcy proceeding on the ground that an unreasonable delay had occurred in the reorganization of the railroad. Thereupon, it ordered a turnover of the debtor's property to an equity receiver in the same court. This is the order that was appealed from and superseded in this case; it adhered to and confirmed the District Court's prior order of March 11, 1952, which had been reversed; it fixed August 1, 1954, at 12:01 A. M., as the effective date of dismissal of the petition for reorganization; and directed John M. Martin, as sole trustee in the reorganization proceeding, to turn over to John M. Martin, as sole equity receiver, all of the debtor's property. The effect of this order would be to eliminate the blended power of the court and the Commission, provided for by Section 77 in the reorganization of insolvent railroad corporations. The history of equity receiverships is not such as to inspire hope of any improvement by the change from bankruptcy to the equity side of the court. In *Palmer* v. *Massachusetts,* 308 U. S., p. 86, the court said:

"Until the amendment of March 3, 1933, rail-

* Page 383 ends here in certified transcript.

roads were outside the Bankruptcy Act. But the long history of federal railroad receiverships, with the conflicts they frequently engendered between the federal courts and the public, left an enduring conviction that a railroad was not like an ordinary insolvent estate. Also an insolvent railroad, it was realized, required the oversight of agencies specially charged with the public interest represented by the transportation system. Indeed, when, in the depth of the depression, legislation was deemed urgent to meet the grave crisis confronting the railroads, there was a strong sentiment in Congress to withdraw from the courts control over insolvent railroads and lodge* it with the Interstate Commerce Commission. Congress stopped short of this remedy. But the whole scheme of Section 77 leaves no doubt that Congress did not mean to grant to the district courts the same scope as to bankrupt roads that they may have in dealing with other bankrupt estates. The judicial process in bankruptcy proceedings under Section 77 is, as it were, brigaded with the administrative process of the Commission."

Since the United States District courts are courts of law (civil and criminal), equity, admiralty, and bankruptcy, it is ordinarily more logical to shift from an equity receivership to a bankruptcy proceeding than it is to reverse the movement. Courts of equity may enjoin suits at law and keep creditors at bay, but

* Page 384 ends here in certified transcript.